UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 19

OVERHEAD DOOR CORPORATION,
OREGON DIVISION

Employer

and Case 36-RD-1537

WILL GIBBONS, an Individual

Petitioner

and

MILLMEN'S UNION LOCAL 1411, WESTERN
COUNCIL OF INDUSTRIAL WORKERS, UNITED
BROTHERHOOD OF CARPENTERS and JOINERS OF AMERICA

Union

SUPPLEMENTAL DECISION

Pursuant to a Decision and Direction of Election issued by the Regional Director of Region 20 of the National Labor Relations Board on December 10, 1998, an election by secret ballot was conducted on February 16, 1999 among the employees of the Employer in the following appropriate collective bargaining unit:

> All full-time and regular part-time production, truck drivers and maintenance employees employed by the Employer at its factory in Salem, Oregon; excluding office clerical, professional, drafting and engineering employees, guards and supervisors as defined in the Act.

The Tally of Ballots served upon the parties at the conclusion of the election set forth the following results:

Approximate number of eligible voters	62
Void ballots	**1**
Votes cast for Petitioner	24
Votes cast against participating labor organization	28
Valid votes counted	52
Challenged ballots	0

On February 23, 1999, the Union timely filed Objections to the Election, alleging, verbatim, the following conduct as objectionable:

Objection No. 1: Before the election, the employer improperly provided a gift or impermissible benefit to one or more employees by inviting them to an employer funded barbecue at which food and drinks were provided. This barbecue was held on or about January 26, 1999.

Objection No. 2: In connection with the barbecue described above, the employer discriminated against and/or disfavored certain employees, including known union supporters, by failing to invite them while inviting other employees. Thus, only a small percentage of those employees on the preferential hiring list were invited to the barbecue which gave the impression that these employees were somehow favored by the employer and that those employees not invited were disfavored.

Objection No. 3: In connection with the barbecue mentioned above, the employer discussed with invited employees their return to work rights. This, coupled with the fact that other employees on the preferential hiring list who were higher on the list were not invited gave the impression that the invited employees would be favored with regards to an eventual return to work and with regards to terms and conditions of employment after their return to work.

Objection No. 4: Prior to the election, the employer promised employees that, if the union was voted out, it would nonetheless still honor the union contract. This false statement promised voters that they would enjoy the benefits of union representation and all the benefits of the union contract including the grievance and arbitration provisions for its entire three year term. This constituted an illegal promise of benefits.

On March 15, 1999, the Regional Director issued a Notice of Hearing. That document advised the parties that the Hearing Officer was directed to prepare and serve on the parties a Report on Objections containing resolutions of credibility and recommendations to the Regional Director as to the disposition of the objections. Pursuant thereto, a hearing was conducted before Hearing Officer Jeffrey E. Jacobs on April 6, 1999. The parties were represented and afforded full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence bearing upon the issues, and to make oral argument at the conclusion of the hearing.

On May 4, 1999, the Hearing Officer issued his Report on Objections in which he made findings of fact, formed conclusions of law, and recommended that all objections be overruled and that the results of the election be certified.

On May 20, 1999, the Union filed exceptions to the Hearing Officer's Report with respect to his recommending the overruling of each and all of the objections.

I have reviewed the Hearing Officer's rulings made at hearing and find that they are free from prejudicial error. I have also carefully considered the Hearing Officer's Report, the Union's Exceptions, and the entire record in the proceeding. I hereby adopt the Hearing Officer's findings and conclusions only to the extent consistent herewith.

Objection 1 through 3

The Union had represented the unit employees for several years. On August 4, 1998, the employees went on strike. The Union notified the Employer on October 1, 1998, that the Employer's contract offer had been accepted and the employees were prepared to return to work.[1] The Employer had hired permanent replacements during the strike, and a preferential hiring list based on seniority was created for the 36 employees not returned to work.

On January 26, 1999, the Employer invited approximately 18 of the employees on the preferential hiring list to attend an after-hours barbecue on the Employer's premises. The Employer selected the invitees based on its assessment of each employee's receptivity to the Employer's message or the employee's interest in returning to work as evidenced by inquiries made to the Employer about work opportunities. Five of the invited employees showed up for the barbecue, along with two, Samuel Moss and Robert Wenger, who had not been invited but were allowed to attend. Hamburgers, hot dogs, chips, potato salad, and sodas were served, and the Employer estimated the cost of such provender at about $3.00 per person. Among those not invited were the two officers of the local union, three individuals known to be union supporters, and one individual who had called attention to himself by his behavior on the picket line. There is no evidence regarding the other approximately eleven employees on the preferential hiring list who were not invited to the barbecue. No employees were paid for their time while attending the barbecue.

The letter containing the invitation to the barbecue included pre-election propaganda and the statement that, "Your vote will have no impact on your recall rights to return to active duty because your recall rights are protected by federal labor law." Similar statements were made by Employer representatives to the employees attending the barbecue, and the employees were told they would be recalled by seniority off a preferential hiring list. In addition, employee Stephen Warren raised the question of how those who had been out in strike might receive vacation pay due them for the first seven months of 1998.[2] He was told that he could receive it if he made a written request, and he and at least one other employee made such request at that time. The Employer did not at any time notify employees who did not attend the barbecue that they could receive their 1998 vacation pay by making a written request, nor did the Employer inform those employees who had not received an invitation to the barbecue that they were on a preferential hiring list by seniority and had rehire rights protected by law.

The Union contends that the provision of an employer-funded barbecue, during which the employees received assurances about their return to work rights and were given an opportunity to "deal with" the Employer about entitlement to payment of accrued vacation pay, "clearly constitutes a benefit." In so arguing, the Union points out that the employees earned about $9.00 per hour, that less senior employees were unfamiliar with the Employer's unwritten past practices concerning payment of vacation pay, and that eligibility to return to work was a very important issue to the employees who had participated in the strike. The thrust of the Union's argument is that the employees who were invited to or attended the barbecue were given more favorable treatment than those not so privileged.

The Board has long held that the provision of free meals and beverages to employees by parties during election campaigns is not grounds for overturning an election. *Model Dye Southern, Inc.,* 246

[1] In his Decision and Direction of Election issued on December 10, 1998 in this matter, the Regional Director of Region 20 concluded that there was not a contract bar to the instant petition, which was filed on October 2, 1998.

[2] The Employer's established vacation policy was that employees could receive time off in, for example, 1998, for vacation time earned in 1997, or be paid on December 1, 1998, for their vacation time earned in 1997. Further, the Employer had an informal policy of paying vacation time earlier than December 1, upon written request. At least some striking employees had requested and received their 1997 vacation pay during the strike.

NLRB 589 (1979); *Lach-Simkins Dental Laboratories*, 186 NLRB 671 (1970); *Northern States Beef*, 226 NLRB 365 (1976); *Zeller Coporation* (115 NLRB 762 (1956). The Board has also held that an employer's exclusion of union adherents from campaign meetings is not grounds for overturning an election. *Luxuray of New York,* 185 NLRB 100 (1970); *Spartus Corporation*, 195 NLRB 134 (1972); *Mueller Brass*, 220 NLRB 1127 (1975). On the other hand, the Board has held that in some circumstances, such exclusion of union adherents constitutes objectionable conduct or conduct violative of Section 8(a)(1) of the Act. In *Delchamps, Inc.,* 244 NLRB 366 (1979), the Board found a violation of Section 8(a)(1) where the employer excluded union adherents from meetings, while granting to other employees who attended the meetings an opportunity to be paid for hours above and beyond their normal working hours. In *Wire Products Manufacturing Corporation*, 326 NLRB No. 62 (1998), the employer openly excluded employee members of the bargaining committee from attending an informational meeting regarding the progress of negotiations. The meeting was held off the employer's premises, and employees were paid for their time while attending. Some employees thereby received an hour and 15 minutes of overtime pay. The Board found that the employer had unlawfully conferred benefits by paying employees to attend the meeting while not allowing members of the Union's bargaining committee to enjoy the same benefit. In *Wimpey Minerals USA,* 316 NLRB 803 (1995), the employer was found to have engaged in objectionable conduct when it did not permit known union advocates to attend campaign meetings for which other employees were paid to attend. I note that in cases where the Board has found exclusion of union adherents from campaign meetings to be violative conduct, employees who did attend were paid for their time, not a factor here.

Here, the Union contends that the Employer's conduct in providing *information* to employees regarding their re-hire rights and vacation pay privileges constituted a benefit to those employees denied to employees who were not invited to attend the barbecue. While it may be helpful, information is intangible, and the Union has cited no cases in which the Board has found an intangible to constitute a benefit, as the term "benefit" is generally used by the Board. Further, the Union has failed to establish that the basis for exclusion of certain employees from the barbecue was union support. The Union has only established that five or six of the 18 who were not invited were known to the Employer to be union supporters. But it was also known to the Employer that all 36 employees, both the group invited to the barbecue and the group not invited, participated in a lengthy strike against the Employer, conduct which suggests some degree of union adherence. Moreover, I note that two individuals, Moss and Werner, who were not invited to the barbecue were nevertheless allowed to attend, unlike the excluded employees in *Wire Products,* supra, who were threatened with arrest if they did not leave the vicinity of the meeting.

Therefore, I conclude that the Employer's conduct in providing a free prime meal of limited value to invited employees in the course of a campaign meeting, and providing certain information of interest to those employees, while excluding known union adherents and other employees from the list of invitees, was not conduct warranting overturning the election. I note that the information, given in response to an employee question, was not "new" or theretofore "secret" information; it was simply a statement of an existing right.

Objection 4

In the hearing, two union representatives, Dan Lowe and Don Howard, testified regarding a conversation they had with supervisor Russ Russell in which they questioned him about remarks he had made to employees. Lowe testified that Russell told him and Howard that Russell had told employees that if the Union were to lose the election, "the contract stays in effect, everything. The only difference is, they don't have to pay dues and the union rep won't be around," and that Russell nodded his head toward Howard as he said this. Further, Lowe testified that Russell also said that the "contract was agreed to by the employees and the company, and it will be in effect for three full years just like it is, except the rep won't be around." Howard's testimony corroborated Lowe's version of Russell's remarks. Russell was not called to testify, nor were any employees who had directly heard Russell make such comments.

The Hearing Officer properly found, in accordance with the Federal Rules of Evidence, that Russell's statement to Lowe and Howard was an unrebutted admission by Russell of the truth of what employees had otherwise told Lowe and Howard.

The Union contends that Russell's statements constituted a promise on the part of the Employer that even if the union were decertified, all of the benefits in the union contract would remain in effect, even those such as the grievance and arbitration provisions which clearly require the participation of the union. Indeed, the contract includes a number of provisions in which union participation is inextricably bound, among them a recognition clause, union security and dues check-off, a plant committee and shop steward, union bulletin board, union label, and others. It would seem, therefore, that the Employer, through Russell, was making a promise impossible to keep. There is no testimony that Russell offered or even that he was asked for any explanation as to how the Employer would or even could unilaterally keep the "contract" in full effect.

The Board permits employers to promise employees, in decertification situations, that if the union is voted out, the status quo will be maintained. *Weather Shield Mfg.,* 292 NLRB 1 (1988*); Ernst Home Centers*, 308 NLRB 848 (1992); *El Cid, Inc.,* 222 NLRB 1315 (1976). However, express promises of better benefits linked to getting rid of the Union are violative conduct. *Fabric Warehouse*, 294 NLRB 189 (1989).

The Union here argues that the Employer's promise to keep the contract in effect made the choice of a bargaining representative a complete nullity, and further that, "The law does not allow the employer to promise to employees something that they are not entitled to if the union loses (for example, the full benefit of the union contract, including the grievance and arbitration provisions.)"

In *Spartus Corporation*, supra, the Board observed, citing Judge Learned Hand, that, "We have been told, many years ago, that words are not pebbles in alien juxtaposition. They take their meaning from their surroundings." Here, there is no evidence at all of the context of Russell's remarks to the employees, only the words themselves, and the context of his retelling them to Lowe and Howard. Russell told them that he had told employees that everything in the contract would stay in effect for a full three years, except they don't have to pay dues and "the union rep won't be around." Russell emphasized to Lowe this last point by nodding his head in Howard's direction.

The only reasonable construction that can be put on Russell's words is that any provision of the contract which required the participation of the union or its representative would not continue. Even if the assurance were interpreted as extending to a grievance procedure -- a highly unrealistic interpretation -- the Union has not cited any Board cases which hold that an employer must restrict its promises of maintaining the status quo only to wages and other monetary benefits, and is precluded from promising to keep, for example, some sort of grievance procedure, or as much of the grievance procedure that does not require

participation by the union. But, common sense dictates that an employer cannot reasonably be perceived as promising to retain *all* provisions of a union contract if the union is decertified, for the employer lacks the power to implement unilaterally those provisions which by their nature require union participation. Such a promise amounts to nothing more than mere campaign rhetoric. As the Hearing Officer pointed out, the Board has held that employees are "mature individuals who are capable of recognizing campaign propaganda for what it is." *Midland National Life Insurance Company*, 263 NLRB 127 (1982).

The Supreme Court has observed "the suggestion of a fist inside a velvet glove," saying that, "Employees are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged." *NLRB v. Exchange Parts Co.,* 375 U.S. 405, 409 (1964). In other words, employees are fully aware of the power of their employer to give and to take away, and it is this awareness which makes a promise of benefits on the part of an employer coercive conduct.

Here, the Employer has, according to the Union, promised its employees to give *full* effect to the existing contract for the next three years. But just as employees are aware of their employer's power to grant benefits (or to carry out threats, for that matter), they surely must also be aware that the Employer has no power to give effect to contractual provisions requiring the participation of the Union, and know that such a "promise" is not included. Moreover, I would not here go so far as to find that the Employer made an unqualified promise to give full effect to the contract, inasmuch as Russell did say he told the employees that "the union rep won't be around."

I conclude that the Employer did no more than promise employees to maintain the status quo, conducted permitted by the Board, and that Russell's remarks do not warrant overturning the election.

CONCLUSION

Having reviewed the Hearing Officer's Report and the entire record in this matter, I hereby affirm the Hearing Officer's rulings. I have modified his findings and conclusions as set forth above, and I have concluded, in agreement with the Hearing Officer, that the objections lack merit. Therefore, I hereby adopt the Hearing Officer's recommendations, and I overrule the objections in their entirety. Accordingly, I hereby issue the following:

CERTIFICATION OF RESULTS OF THE ELECTION

Pursuant to authority vested in the undersigned by the National Labor Relations Board,

IT IS HEREBY CERTIFIED that a majority of the valid ballots has not been cast for the Union, and that the Union is not the exclusive bargaining representative of all the employees in the unit herein involved within the meaning of Section 9(a) of the National Labor Relations Act, as amended.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive

Secretary, 1099 14th Street N.W., Washington, D.C. 20570. This request must be received by the Board in Washington by June 11, 1999.

DATED at Seattle, Washington this 28th day of May 1999.

/s/ PAUL EGGERT

Paul Eggert, Regional Director
National Labor Relations Board
2948 Jackson Federal Building
915 Second Avenue
Seattle, Washington 98l74

378-2897-2500
378-2839-1700